STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0711

David Smits, as Trustee for the next of kin for Brian Short, Karen Short, Madison Short, Cole Short, Brooklyn Short,
Appellant,

vs.

Park Nicollet Health Services, et al.,
Respondents.

Filed February 16, 2021
Reversed and remanded
Frisch, Judge

Hennepin County District Court
File No. 27-CV-19-12937

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Aaron D. Van Oort, Hannah M. Leiendecker, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota; and

Mark A. Solheim, Anthony J. Novak, Kevin T. McCarthy, Larson King, LLP, St. Paul, Minnesota (for respondents)

Considered and decided by Frisch, Presiding Judge; Hooten, Judge; and Smith, Tracy M., Judge.

SYLLABUS

1. The professional duty of care a mental-health provider owes to a patient is not contingent on the provider's custody or control over the patient.

2. Summary judgment is not appropriately granted to dismiss medical-malpractice claims alleging the failure to prevent familicide where a genuine issue of

material fact exists regarding whether the familicide was a foreseeable risk to a foreseeable plaintiff based on departures from applicable standards of care. Expert testimony may establish a genuine issue of material fact as to the foreseeability of risk to a foreseeable plaintiff.

OPINION

FRISCH, Judge

This appeal follows the summary-judgment dismissal of a wrongful-death action arising out of the September 2015 deaths of Brian Short by suicide and his family members by familicide. Appellant, who was appointed trustee for the next of kin of Short and his family members, argues that the district court erred by determining that Short's mental-health provider owed no duty as a matter of law to Short or his family members. Because Short's mental-health provider owed a duty of care to him as a matter of law, and because genuine issues of material fact exist as to whether Short's family members were foreseeable plaintiffs and whether familicide was a risk foreseeable to the mental-health provider, dismissal of the action at summary judgment was improper. We therefore reverse and remand for trial.

FACTS[1]

Short's Treatment by Park Nicollet Practitioners

In the three months leading up to the deaths of Short and his family members, Short sought treatment for symptoms of anxiety and depression on nine separate occasions from multiple Park Nicollet practitioners. On June 16, 2015, Short visited a Park Nicollet urgent-care facility, citing concerns about stress and anxiety and wanting to rule out heart-related conditions. Short had a scheduled appointment to see his primary-care doctor two days later, but he expressed that he could not wait that long for an evaluation. Short reported no history of psychological problems, such as depression. And he denied any suicidal or homicidal ideations. A physician assistant (PA) treated Short in urgent care. The PA ruled out cardiac issues, prescribed Xanax for the anxiety, and directed Short to follow up with his primary-care doctor.

Two days later, on June 18, 2015, Short visited his primary-care doctor, also a Park Nicollet practitioner, for a full physical examination. The primary-care doctor documented that Short wanted to address issues including "anxiety and depressed mood," that Short had lost 20-30 pounds, that Short denied suicidal ideation but stated that his "mood ha[d] been a little bit down here over the last 2 or 3 weeks," and that Short was experiencing difficulty sleeping. The primary-care doctor prescribed 100 mg Zoloft and directed Short

[1] We recite the facts in the light most favorable to appellant, the party against whom summary judgment was granted. *See, e.g.*, *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

to take one-half of a pill daily to start, to increase the dosage to a full pill after four or five weeks, if necessary, and to return for a recheck in five weeks, if needed.

On June 27, 2015, Short returned to the Park Nicollet urgent-care facility and again saw the PA. The PA documented continuing issues with anxiety and insomnia and noted that the Zoloft prescribed by Short's primary-care doctor did not yet appear to be effective. The PA prescribed Ambien and Ativan and noted that Short should follow up with his primary-care doctor as needed.

On July 6, 2015, Short returned to his primary-care doctor with complaints of anxiety and insomnia. The primary-care doctor documented that, "Overall symptoms are moderate to severe." The doctor instructed Short to increase to the full dose (100 mg) of Zoloft, refilled the Ativan, and prescribed trazodone in place of Ambien to help with sleep. Short's primary-care doctor also suggested that Short see a counselor.

On July 15, 2015, Short saw an advanced-practice registered nurse in Park Nicollet's psychiatry department. The nurse documented that Short had been referred by his primary-care doctor and that Short had not noted significant improvement in his symptoms since starting the medications prescribed. The nurse administered an assessment known as a PHQ-9, on which Short scored 23 out of 27, indicating severe depression.[2]

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[2] The PHQ-9 is a screening tool used to assess depression. According to Park Nicollet's corporate representative,

> greater than . . . 10 on a PHQ-9 could be suggestive that the patient has depression because you're noting that the patient is reporting up to five symptoms more than half the time. When you look at the scoring of the PHQ-9 . . . five to 10 is mild, 10 to 15 is moderate, 15 to 20 is moderate to severe, and 20 and above is severe.

On the PHQ-9 form, Short reported that nearly every day during the preceding two weeks, he had felt down, depressed, or hopeless; struggled to fall asleep or stay asleep; had a poor appetite; felt bad about himself—that he was a failure or had let himself or his family down; and struggled to concentrate. Short reported that on more than half the days, he had had little interest or pleasure in doing things, and he reported that on a few days, he had had thoughts that he would be better off dead or of hurting himself in some way. On the question regarding self-harm, Short included a handwritten note after circling the number representing "Several Days." The handwritten notes reads, "I wouldn't say several days but a few."

The nurse also documented Short's struggles, noting that, "On a scale of 1-10 with 10 being the best, he rates his mood at only a 3." The nurse noted that Short was having trouble falling and staying asleep; his appetite had been down and he had lost weight; he "endorse[d] feeling irritable, overwhelmed and hopeless"; his "[i]nterest in people and activity [was] down and the only thing he could think of that he enjoy[ed was] TV"; and he had "tended to isolate." The nurse documented that Short "has had thoughts of suicide, however, denied any plan or intent." The nurse concluded her summary of Short's condition by documenting that: "Brian reports anxiety every day for most of the day. Nights are the most difficult time of day for him. He will often wake up in the middle of the night in a panic. His heart rate increases and he has sweating."

The nurse diagnosed Short with major depression, single episode, severe, without psychosis, as well as generalized anxiety disorder and panic disorder. She directed Short

to continue with the same dose of Zoloft, increased his dose of Ativan, referred him to therapy, and directed him to return to see her in four weeks, or sooner if needed.

On July 16, 2015, Short saw a Park Nicollet licensed social worker for psychotherapy. The social worker documented a PHQ-9 score of 23 and noted that Short's "[h]ighest scores include[d] little interest and pleasure in doing things, feeling down and depressed, trouble falling asleep, feeling bad about himself, [and] feeling restless." The social worker documented that Short "denie[d] suicidal ideation, intent, or plan." The social worker also documented that Short had "been started on Zoloft, recently increased." Short saw the social worker again on August 4, 2015, but no PHQ-9 was conducted on that date, although the social worker had set as a treatment goal that Short score three or lower on the PHQ-9 for three consecutive visits. Short had a final appointment with the social worker on August 12, 2015. Again, no PHQ-9 was completed, but the social worker documented that Short "continue[d] to struggle with symptoms of depression and anxiety."

On August 14, 2015, Short had a final visit with the nurse. Prior to that visit, on July 28, 2015, Short had contacted Park Nicollet by telephone to report that the Zoloft was not helping to decrease his anxiety, and the nurse authorized an increase in the Zoloft dosage to 150 mg and an increase in the trazodone dosage as well. Short's medical records reflect a PHQ-9 score of 20 on August 14, and the nurse documented that, with the exception of insomnia, all but one of Short's symptoms were unchanged or worse. On that date, the nurse prescribed Lexapro to replace Zoloft and instructed Short to return in four to six weeks, or sooner if needed.

Short had an appointment scheduled with the social worker for August 27, 2015, but Short rescheduled that appointment to September 10, 2015. On September 10, 2015, Short was found dead in his home, having fatally shot his wife, his three teenaged children, and himself.

This Action

After being appointed as trustee for the next of kin of Short and his family members, appellant David Smits initiated this action, alleging that respondent Park Nicollet Health Services and others (together, Park Nicollet) breached standards of care by failing to properly assess, evaluate, and treat Short's severe depression; failing to properly inform Short and his family members of the risks and benefits of the prescribed medications, forms of therapy, and possible alternative treatments; failing to properly monitor Short's response to medications prescribed by Park Nicollet healthcare providers; and failing to obtain Short's informed consent for elected treatments.

In support of these claims, appellant obtained expert opinions from Harrison G. Pope, Jr., M.D., M.P.H, a professor of psychology at Harvard Medical School; Jay Callahan, M.S.W., M.A., Ph.D., an adjunct professor at Loyola University Chicago School of Social Work; Carolyn Lucas-Dreiss, MS, PMHCNS-BC, a clinical nurse specialist in the area of behavioral health at the Johns Hopkins Medical Institutions; Robert Kinscherff, Ph.D., J.D., a licensed psychologist, attorney, and professor at William James College; and Carl Malmquist, M.D., M.S., a licensed psychiatrist and professor of social psychiatry at the University of Minnesota. Appellant's primary experts were each expected to testify that the Park Nicollet providers departed from the established and applicable standards of

care in treating Short and that those departures caused the suicide and familicide.[3] The primary experts were also expected to testify that the suicide and familicide were foreseeable consequences of the failure to properly treat Short. Appellant's rebuttal experts were expected to testify to foreseeability and the standard of care.

Following discovery, Park Nicollet moved for summary judgment. The district court granted the motion, concluding that Park Nicollet owed no duty to Short or his family members as a matter of law.[4] The district court analyzed whether a duty arose by virtue of a special relationship, affirmative conduct by Park Nicollet, or the doctor-patient relationship between Short and Park Nicollet. The district court concluded that Park Nicollet owed no duty to Short or his family members under any of these theories and therefore directed the entry of judgment in favor of Park Nicollet.

This appeal follows.

ISSUES

I. Did the district court err by determining that Park Nicollet owed no duty to Short as a matter of law?

II. Did the district court err by determining that Park Nicollet owed no duty to Short's family members as a matter of law?

[3] We use the term "familicide" to refer to Short's homicide of his wife and three children.

[4] In the same order, the district court denied Park Nicollet's motion for summary judgment on causation and granted in part and denied in part appellant's motion for summary judgment on certain of Park Nicollet's pleaded affirmative defenses. Those rulings are not at issue in this appeal.

ANALYSIS

This court reviews the grant of summary judgment de novo to determine whether genuine issues of material fact exist and whether judgment is appropriate as a matter of law. *See Warren v. Dinter*, 926 N.W.2d 370, 374-75 (Minn. 2019). In so doing, we must "view the evidence in the light most favorable to the nonmoving party" and "resolve all doubts and factual inferences against the moving parties." *Id.* (quotation omitted). "A moving party is entitled to summary judgment when there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995); *see also* Minn. R. Civ. P. 56.01; *Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 201 (Minn. 2018).

Appellant asserted negligence claims in a wrongful-death action under Minn. Stat. § 573.02, subd. 1 (2018). Under that statute: "When death is caused by the wrongful act or omission of any person or corporation, the trustee . . . may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission." Minn. Stat. § 573.02, subd. 1. Accordingly, the pertinent inquiry is whether, had they lived, Short and/or his family members could have maintained negligence claims against Park Nicollet.

In all negligence claims, including those against medical professionals, the existence of a duty owed by the defendant to the plaintiff is a prerequisite to a finding of liability. *Warren*, 926 N.W.2d at 375; *see also Fenrich*, 920 N.W.2d at 201 (stating elements of negligence claim); *Molloy v. Meier*, 679 N.W.2d 711, 717 (Minn. 2004) ("A

medical malpractice action is based on principles of tort liability for negligence; the existence of a duty running to the plaintiff is a prerequisite to a finding of negligence.").

Generally, whether a duty exists is a question of law for resolution by the court. *See Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 629 (Minn. 2017). But "when duty depends on foreseeability, and the material facts regarding foreseeability are disputed, or there are differing reasonable inferences from undisputed facts (a 'close call'), summary judgment on the element of duty should be denied and the negligence claim, including the issue of foreseeability, should be tried." *Warren*, 926 N.W.2d at 380; *see also Fenrich*, 920 N.W.2d at 207 ("In close cases, the issue of foreseeability should be submitted to the jury." (quoting *Domagala v. Rolland*, 805 N.W.2d 14, 27 (Minn. 2011)); *Senogles v. Carlson*, 902 N.W.2d 38, 43 (Minn. 2017) ("As we reaffirmed recently, when the issue of foreseeability is clear, the court, as a matter of law, should decide it, but in close cases, the issue of foreseeability is for the jury."); *Montemayor*, 898 N.W.2d at 630 ("[W]hen reasonable persons might differ as to whether the evidence establishes that the injury was foreseeable, we have consistently submitted the issue to the jury." (quotation omitted)).

Appellant asserts that Park Nicollet owed a duty to both Short and his family members as his healthcare provider. He also asserts that Park Nicollet owed a duty based on Park Nicollet's own conduct that created a foreseeable risk of harm to foreseeable

plaintiffs. We address in turn whether Park Nicollet owed a duty to Short and whether it owed a duty to his family members.

I. Park Nicollet owed a duty to Short as his healthcare provider.

It is well established that healthcare providers—including those treating mental-health issues—owe their patients "a duty to act with the required standard of skill and care." *Becker v. Mayo Found.*, 737 N.W.2d 200, 216 (Minn. 2007); *see also Zagaros v. Erickson*, 558 N.W.2d 516, 521 (Minn. App. 1997) ("A psychologist has a duty to diagnose mental disease properly and to apply proper treatment.").[5] "The standard of skill and care required of all physicians is that degree of skill and care possessed and exercised by practitioners engaged in the same type of practice under like circumstances." *Becker*, 737 N.W.2d at 216 (citing *Lundgren v. Eustermann*, 370 N.W.2d 877, 880 (Minn. 1985)). Indeed, so enshrined is this duty that it is not separately identified as an element of a medical-malpractice claim brought by a patient. *See, e.g.*, *id.* Rather, a patient asserting a medical-malpractice claim must prove (1) the applicable standard of care, (2) the defendant's departure from that standard of care, and (3) that the departure from the standard of care directly caused the patient's injury. *Id.*; *see also Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 329 (Minn. 2013) (stating elements of medical-malpractice claim without

[5] The Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41 (2012) recognizes the relationship between a mental-health professional and his or her patient as a special relationship giving rise to a duty of reasonable care. We rely not on section 41 but on general negligence principles under established Minnesota common law, as articulated by the supreme court. *Cf. Domagala*, 805 N.W.2d at 25-26 (declining to adopt Restatement (Second) of Torts § 321 (1965) but relying on "general negligence principles found in common law" to articulate duty on similar grounds).

reference to duty); *Tousignant v. St. Louis County*, 615 N.W.2d 53, 59 (Minn. 2000) (same); *Reinhardt v. Colton*, 337 N.W.2d 88, 94 (Minn. 1983) (same); *Smith v. Knowles*, 281 N.W.2d 653, 655 (Minn. 1979) (same for wrongful-death medical-malpractice claim); *cf. Warren*, 926 N.W.2d at 377 (evaluating whether duty of physician extends to third party).

Based on well-established duties healthcare providers owe to their patients, we hold that Park Nicollet owed a duty to Short "to act with the required standard of skill and care," *Becker*, 737 N.W.2d at 216, and that the district court erred by granting summary judgment in favor of Park Nicollet on appellant's claim arising out of Short's suicide.

Park Nicollet asserts that it owed no duty to prevent Short's death by suicide because it did not have custody or control of him, relying on the supreme court's decisions in *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792-93 (Minn. 1995), and *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 63-64 (Minn. 2000).[6] In *Donaldson*, the supreme court held that the YMCA had no duty to

> prevent a resident from committing suicide where [it did] not have custody or control of the resident, [did] not deprive the resident of normal opportunities for self-protection, was not in a position to protect the resident from committing suicide, and the resident did not have a reasonable expectation that the [YMCA] would protect her from committing suicide.

539 N.W.2d at 790 (syllabus by the court). And in *Sandborg*, a case arising out of a jail detainee's suicide, the supreme court recognized that

[6] Park Nicollet also cites *Mertes v. City of Rogers*, No. 17-CV-4508 (SRN/SER), 2019 WL 3306147 (D. Minn. July 23, 2019). *Mertes* is not binding on this court, and it is distinguishable for the same reasons as are *Donaldson* and *Sandborg*.

> it is only when a person is particularly vulnerable and dependent upon a second person who holds considerable power over the first person's welfare, and the risk of harm to the first person is reasonably foreseeable, that this special relationship imposes a legal duty on the part of the second person to protect the first from the expected harm.

615 N.W.2d at 63-64.

Park Nicollet argues, and the district court concluded, that under *Donaldson* and *Sandborg*, the act of suicide is a third-party harm, and Park Nicollet could only owe a duty to Short as an exception to the "general common law rule that a person does not owe a duty of care to another—e.g., to aid, protect, or warn that person—if the harm is caused by a third party's conduct." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177-78 (Minn. 2014). But neither *Donaldson* nor *Sandborg* implicated the independent and distinct duty owed by a healthcare provider in the treatment and care of a patient for mental-health issues. *See Becker*, 737 N.W.2d at 213 (separately addressing whether physician owed professional duty of care after concluding that no special relationship was formed based on custody or control). For this reason, *Donaldson* and *Sandborg* are inapposite and do not impact our conclusion that Park Nicollet owed Short a duty of care as his mental-health provider.

Park Nicollet also relies on cases involving the existence of a duty based on custody or control of a patient to support the conclusion that a mental-health provider *must* have custody or control of the patient to give rise to the existence of a duty. *See Tomfohr v. Mayo Found.*, 450 N.W.2d 121, 122-25 (Minn. 1990) (addressing certified question on comparative-fault principles in context of claim based on failure of hospital to prevent suicide by patient in locked unit); *Lundgren v. Fultz*, 354 N.W.2d 25, 27-29 (Minn. 1984)

(reversing summary-judgment dismissal of claim based on psychiatrist's alleged duty and ability to control former patient's access to guns); *Rum River Lumber Co. v. State*, 282 N.W.2d 882, 884-85 (Minn. 1979) (affirming jury instruction based on hospital's duty to control committed patient). We are not persuaded that these cases compel such a conclusion.

The supreme court in *Tomfohr* confirmed that the scope of the duty owed by a mental-health provider to a patient is informed by circumstances demonstrating that the patient has an ascertainable, decreased ability to control self-destructive behavior, noting that "that inability becomes a component of the scope of the foreseeability of harm." *Tomfohr*, 450 N.W.2d at 124 (citing cases). *Tomfohr* involved the duty of a hospital to protect a patient in a locked ward from death by suicide. *Id.* at 125. The supreme court did not analyze the issue of duty in terms of custody or control, let alone declare that custody or control of the patient was a prerequisite to the existence of a duty of care. It instead approved of the reasoning that, "when [the hospital] voluntarily undertook the duty to protect Tomfohr from self-inflicted injury, it assumed the duty of exercising reasonable care to see that the event did not occur." *Id.* (referencing "duty of the medical care provider to prevent foreseeable harm").

In *Lundgren*, the supreme court discussed the duty of a psychiatrist in terms of ability to control his patient, 354 N.W.2d at 27-28, but we are not convinced that *Lundgren* operates to sever the well-recognized duty owed by a healthcare provider in the care and treatment of its patient even when the provider does not have custody or control of that patient. In *Lundgren*, a psychiatrist signed an authorization allowing police to return

handguns to his patient, and the patient later shot and killed a woman. *Id.* at 27. In addressing whether the psychiatrist owed a duty to a third person for the wrongful acts of his patient, the supreme court considered whether a special relationship existed and whether the harm was foreseeable. *Id.* at 27-28. The supreme court held that the "special facts" of the case presented a jury question as to duty, including whether the psychiatrist assisted his patient in gaining access to handguns later used in a homicide. *Id.* at 29. The negligent act in *Lundgren* did *not* involve the psychiatrist's departure from applicable standards of care in the *care and treatment* of the patient or a patient's death by suicide.

And in *Rum River Lumber*, a case arising from an arson committed by an escaped mental-health patient, the supreme court rejected an argument that the "standard of care should be equivalent to that used in cases of medical malpractice." 252 N.W.2d at 883, 886. The supreme court explained that, although that standard might be applicable in assessing "a *professional judgment* to release a mental[-health] patient, it is largely irrelevant in the context of assessing the actions of a hospital staff in failing to prevent a dangerous person from escaping." *Id.* at 886 (emphasis added).

Here, Park Nicollet's exercise of professional judgment in treating Short is comparable to the hypothetical professional judgment to release in *Rum River Lumber*. Accordingly, medical-malpractice principles—including the well-established professional duties—apply. Thus, we conclude that a mental-health provider's lack of custody or control over a patient does not undermine or negate its legal duty to provide treatment in accordance with the applicable standards of care.

Our conclusion that Park Nicollet owed a duty to Short is not dispositive of whether Park Nicollet is ultimately liable for damages stemming from Short's suicide. At trial, appellant will be required to prove through expert testimony that Park Nicollet departed from the applicable standards of care and that those departures were the cause of Short's suicide. *See Becker*, 737 N.W.2d at 216. Park Nicollet and its experts contest liability, and the resolution of these genuine disputes is for the jury. Our holding is limited to the unremarkable legal proposition that Park Nicollet, as a mental-health treatment provider, owed a duty to Short as its patient and that the existence of that legal duty is not contingent on Park Nicollet's custody or control of Short. Accordingly, the district court erred in granting summary judgment to Park Nicollet on appellant's claim arising out of Short's suicide.

II. Genuine issues of material fact exist as to whether familicide was a foreseeable harm and whether Short's family members were foreseeable plaintiffs.

Appellant argues that the district court erred as a matter of law in dismissing the wrongful-death action arising out of the deaths of Short's family members because familicide was a foreseeable risk of the treatment Park Nicollet provided to Short. The district court again concluded that because Park Nicollet did not have custody or control over Short, it owed no duty to protect his family members from the harm inflicted by Short. Because genuine issues of material fact exist as to whether members of the Short family were foreseeable plaintiffs and whether familicide was a risk foreseeable to Park Nicollet, the district court erred in entering summary judgment of dismissal on the claims arising out of the deaths of Short's family members.

As a threshold matter, beyond well-established duties a healthcare provider owes to a patient, established Minnesota law recognizes that a healthcare provider may *also* owe a duty of care to a third party "based on the foreseeability of harm." *Warren*, 926 N.W.2d at 377, 380 (holding that genuine issue of material fact existed regarding foreseeability that plaintiff would rely on hospitalist's decision not to admit her); *see also Molloy*, 679 N.W.2d at 719 (holding that "a physician's duty regarding genetic testing and diagnosis extends beyond the patient to biological parents who foreseeably may be harmed by a breach of that duty"); *Skillings v. Allen*, 173 N.W. 663, 663-64 (Minn. 1919) (holding that doctor could be liable to parents of patient with scarlet fever for negligently advising parents that child was not contagious when doctor was "bound to know that they would be likely to follow his advice"). Applying this well-established principle of Minnesota law here, Park Nicollet may have owed a duty of care to Short's family members as Short's healthcare provider if harm to Short's family members was a foreseeable risk of the alleged departures from the standard of care.

Park Nicollet may also owe a duty based on its own conduct that created a foreseeable risk of harm. We recognize the general rule that a person owes no duty to protect another from harm caused by a third party. *Fenrich*, 920 N.W.2d at 201. But Minnesota law recognizes exceptions to this rule. As is relevant here, such a duty may arise when the defendant's own conduct creates a foreseeable risk to a foreseeable plaintiff. *Id.* at 203; *see also Domagala*, 805 N.W.2d at 26 (explaining that "when a person acts in some manner that creates a foreseeable risk of injury to another, the actor is charged with an affirmative duty to exercise reasonable care to prevent his conduct from harming

others").[7] In analyzing the duty that may arise from a defendant's "own conduct," the supreme court has "drawn a distinction between misfeasance and nonfeasance." *Fenrich*, 920 N.W.2d at 203. The defendant's "own conduct" means misfeasance, or "active misconduct working positive injury to others." *Doe 169*, 845 N.W.2d at 178 (quotation omitted). Nonfeasance—"passive inaction or a failure to take steps to protect others from harm"—will not support imposition of a duty. *Id.* (alteration omitted) (quotation omitted). The determination of whether conduct is misfeasance or nonfeasance presents a question of law, unless there are genuine issues of fact about what the defendant did or what responsibilities the defendant assumed. *See Fenrich*, 920 N.W.2d at 205 n.4.

At oral argument, Park Nicollet argued that the "own conduct" exception cannot apply because the alleged departures from the applicable standards of care are mere failures to act amounting to nonfeasance. We disagree. This is not a case of "passive inaction or a failure to take steps to protect others from harm," *id.* at 203, but rather a case in which a healthcare provider undertook an ongoing duty to provide treatment within the standard of care, *see Becker*, 737 N.W.2d at 216 ("Once a physician undertakes to treat a patient, that physician owes the patient a duty to act with the required standard of skill and care."). Park Nicollet accepted Short as a patient and provided ongoing care for his mental-health issues.

[7] Park Nicollet suggests that appellant must demonstrate the existence of a special relationship in order to establish a duty based on foreseeable harm caused by a third party. But the Minnesota Supreme Court has not imposed such a requirement and instead has clearly explained that a defendant may be held liable to a plaintiff for harm caused by a third party if there is *either* a special relationship and a foreseeable risk of harm *or* the defendant's own conduct creates a foreseeable risk of harm. *See Fenrich*, 920 N.W.2d at 202-03.

It selected providers to treat him, directed the timing of his treatment, prescribed medications, and continued to oversee his care until his tragic death. These facts are comparable to, if not qualitatively more significant than, the types of assumed supervision that the supreme court has determined to be misfeasance in other cases. *See Fenrich*, 920 N.W.2d at 203-04 (concluding that evidence that coach undertook supervision over trip and failed to provide direction to teen driver was sufficient to demonstrate misfeasance)[8]; *Verhel by Verhel v. Indep. Sch. Dist. No. 709*, 359 N.W.2d 579, 588–89 (Minn. 1984) (holding that school district owed duty based on its conduct in assuming supervision and control over cheerleading squad and its activities).

Park Nicollet next argues that, even if its actions amount to misfeasance, the "own conduct" exception cannot apply because familicide was not a foreseeable risk and members of the Short family were not foreseeable plaintiffs. In determining whether an injury was foreseeable, we "look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility." *Domagala*, 805 N.W.2d at 26 (quoting *Foss v. Kincade*, 766 N.W.2d 317, 322 (Minn. 2009)). "The test is not whether the precise nature and manner of the plaintiff's injury was foreseeable, but whether the possibility of an [injury] was clear to [a] person of ordinary prudence." *Id.* at 27 (quotation omitted). The foreseeability requirement is not satisfied if "the connection between the danger and the defendant's own conduct is too remote." *Doe*

[8] In *Fenrich*, the supreme court held that genuine issues of material fact existed as to misfeasance because of conflicting evidence over the nature of the defendant's conduct. 920 N.W.2d at 204-05. In this case, the relevant facts are not disputed, and neither party argues that misfeasance cannot be decided as a matter of law.

169, 845 N.W.2d at 178. "[T]he existence of a duty to protect others from harm . . . depends heavily on the facts and circumstances of each case." *Id.* And, as we noted at the outset of this opinion, foreseeability must be decided by a jury in close cases. *See, e.g.*, *Fenrich*, 920 N.W.2d at 207.

Appellant submitted evidence in support of his contention that suicide and familicide were foreseeable risks flowing from Park Nicollet's departures from the standards of care. The record contains evidence of the so-called black-box warnings on the medications that Park Nicollet prescribed to Short. For instance, one warning provided, in relevant part:

> Patients of all ages who are started on antidepressant therapy should be monitored appropriately and observed closely for clinical worsening, suicidality, or unusual changes in behavior. *Families and caregivers should be advised of the need for close observation and communication with the prescriber*.

(Emphasis added.) Appellant's experts opined that the risk of harm to Short's family was foreseeable to Park Nicollet based on the black-box warnings, and the record contains other evidence that severely depressed individuals may pose a heightened risk of self-harm and of harming family members, amounting to an "acute safety concern." Appellant's experts also opined that suicide and familicide were risks of harm foreseeable to Park Nicollet based on the course of Short's mental illness as well as his forensic profile and familial history of mental-health issues. In addition, appellant's experts cited peer-reviewed studies demonstrating that violence and aggression are known risks of the medications prescribed to Short, as is akathisia, a movement disorder characterized by a feeling of motor restlessness and inability to stay still. The record contains evidence that Short exhibited

behaviors consistent with akathisia shortly before his death, and the expert witnesses opined that such behavior indicated an increased risk that Short would harm himself or others. Appellant's experts are also expected to testify to a heightened risk of altruistic homicide because Short was a depressed senior male of household (the sole breadwinner for his family) who perceived a financial crisis and displayed extreme hopelessness and irrational, delusional, catastrophic thinking immediately prior to the incident.

Instead of viewing this evidence in the light most favorable to appellant as the nonmoving party, the district court reasoned that the suicide and familicide were not foreseeable to Park Nicollet because Short had no history of violence or attempts at self-harm, and because, although "he had had past thoughts of suicide, he repeatedly denied to Park Nicollet any current intent, plan, or ideation of suicide or homicide." The district court further stated that "no witness except [appellant's] experts contend that Short's actions were foreseeable."

The district court erred in concluding that the existence of foreseeability was foreclosed as a matter of law because the record contained no evidence of a previous violent incident or attempt at self-harm and merely included expert testimony that the departures from the standards of care created a foreseeable risk of harm to Short's family members. As to the former, while Park Nicollet may argue to the fact-finder that the absence of previous indicia of violence favors a finding that the risk was not foreseeable, we are aware of no Minnesota authority requiring proof of a previous violent incident to meet the legal threshold of foreseeability. As to the latter, the supreme court recently reaffirmed that

expert testimony may provide the basis of genuine issues of material fact to support the existence of foreseeability. *See Montemayor*, 898 N.W.2d at 628.

Our review of the totality of record evidence regarding foreseeability, including the expert opinions, viewed in the light most favorable to appellant, demonstrates that genuine issues of material fact exist regarding the foreseeability of familicide.[9] To be clear, we do not hold that the familicide was *in fact* a foreseeable risk for members of the Short family. This case falls into the category described by the supreme court as a "close call" where the issue of foreseeability must be tried before a jury. *Warren*, 926 N.W.2d at 380. Accordingly, we conclude that the district court erred by granting summary judgment in favor of Park Nicollet on the issue of duty for the claims arising out of the deaths of Short's family members.[10]

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[9] We reject appellant's assertion that because the district court identified genuine issues of material fact as to causation, genuine issues of material fact necessarily exist as to duty. Duty and causation are distinct elements of a negligence action. Foreseeability in the context of duty requires an inquiry into whether Park Nicollet should have anticipated that alleged departures from the standard of care could create a foreseeable risk *to a foreseeable plaintiff*—here, Short's family members. *See Fenrich*, 920 N.W.2d at 202 (stating that duty exists when defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff). Causation requires an inquiry into whether Park Nicollet's alleged departures from the standards of care were the cause of harm to the members of Short's family. *See Dickhoff*, 836 N.W.2d at 333 (stating that medical-malpractice "plaintiff is required to prove that it is more probable than not that the harm resulted from the physician's negligence as opposed to the preexisting condition" (quotation omitted)). An injury resulting from a departure from the standards of care may be a foreseeable risk but such a departure may not be the cause of the complained-of harm. And the converse is also true. Accordingly, we reject appellant's blanket assertion that a genuine issue of fact must exist as to duty if one exists as to causation.

[10] Because we conclude that genuine issues of material fact exist as to whether Park Nicollet owed a duty—either as Short's healthcare provider or because of its own conduct—based on the foreseeability of harm, we need not reach appellant's arguments

As a final matter, we emphasize that our decision is grounded in established common-law principles of negligence as pronounced by the supreme court. Park Nicollet asserts that because a case of this nature has not previously been addressed by the supreme court, the recognition of the existence of a duty (or a conclusion that fact issues exist as to the existence of duty) amounts to the creation of new law beyond the authority of this court. *See, e.g.*, *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. Dec. 18, 1987). We disagree. That the specific factual circumstances of this case have not previously been addressed by the supreme court does not mean that we must adopt new law to address those circumstances. Rather, we apply settled common-law principles to determine whether a duty may exist under the factual circumstances presented. *See, e.g.*, *Fenrich*, 920 N.W.2d at 206 (rejecting argument that court announced new rule of law by applying common-law rule in the procedural posture of that case).

DECISION

The district court erred by granting summary judgment in favor of Park Nicollet on appellant's wrongful-death medical-malpractice claims. Park Nicollet owed a duty to Short as a matter of law as his healthcare provider that was not contingent on its custody

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that Park Nicollet owed a duty based on a special relationship. But we disagree with the parties and the district court that the issue of whether such a special relationship exists in this close case can be determined as a matter of law. *See Lundgren*, 354 N.W.2d at 28 (holding that existence of a special relationship presents a question of fact turning on the foreseeability of harm and control over patient).

or control of Short, and genuine issues of material fact exist as to whether Park Nicollet's own conduct created a foreseeable risk to Short's family members. We reverse the summary judgment and remand for trial.

Reversed and remanded.